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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

In re J. C., a Minor.

MARIA C.,

Petitioner and Respondent,

V.

A. C.,

OPINION

Objector and Appellant.

APPEAL from a judgment of the Superior Court of Tulare County. William Silveira, Judge.

Leslie A. Barry, under appointment by the Court of Appeal, for Objector and Appellant.

Kathy L. Wallace for Petitioner and Respondent.

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Maria C. (petitioner) petitioned the trial court to declare J.C. free from the parental custody and control of his mother and father on the basis that J.C. had been abandoned for more than one year by his mother and father. A.C. (mother) objected to the petition claiming that petitioner, who was married to A.C.'s cousin, tricked mother into leaving J.C. with petitioner shortly after his birth. The court granted the petition and terminated mother's parental rights. Mother appeals, claiming the ruling of the trial court was not supported by substantial evidence. We affirm.

FACTS AND PROCEEDINGS

Mother left her infant child, J.C., in the care of petitioner following his birth in June of 2006. In April of 2008, mother, accompanied by law enforcement, came to the door of petitioner seeking to reclaim J.C. Petitioner showed the officers documents indicating that she was granted custody of J.C. Petitioner was allowed to keep J.C. but was advised she should obtain a legal guardianship. Based on these events, petitioner filed a request to adopt J.C., claiming the consent of mother was not necessary because mother signed legal papers giving J.C. to petitioner shortly after his birth. Mother objected to the adoption request.

Also in April of 2008, petitioner filed a petition for guardianship of J.C.² Temporary guardianship was granted to petitioner in May of 2008. The temporary guardianship included orders for visitation, counseling, and reunification services to mother.

On July 8, 2008, petitioner filed a petition pursuant to Family Code section 7822 to declare J.C. free from the parental custody and control of mother and father based on

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¹ Father was served, but never appeared during the proceedings. He is not a party to this appeal.

² The trial court took judicial notice of the entire file in the guardianship proceeding.

abandonment of J.C. by mother and father.³ Mother objected to the petition. Counsel was appointed for J.C. In addition, a social worker prepared a report according to section 7851.

After many delays, the matter proceeded to a contested hearing beginning on May 27, 2009. The court stated at the outset of the hearing that it was going to consider the report from the social workers, the reports regarding visitation between mother and J.C., the report prepared by J.C.'s counsel, the guardianship file, and the evidence (in the form of testimony and exhibits) presented at the hearing.

Petitioner testified that her husband is mother's cousin. Petitioner met mother when mother was pregnant with her first child, J., who was approximately five years old at the time of the hearing. Later mother moved to Idaho. Mother contacted petitioner wanting to move back to the Porterville area. Mother moved in with petitioner, petitioner's husband, and petitioner's children in August of 2005. At the time mother moved in with petitioner, mother was not pregnant.

Mother became pregnant in September of 2005. The father was married and had two children with his current wife. He was not happy with the pregnancy news. Father arranged for mother to move into a trailer. Father's wife found out about the relationship between mother and father, and beat up mother. Mother moved back in with petitioner in November of 2005.

When mother moved back to petitioner's home, she said that father did not want the baby and wanted mother to have an abortion. Mother tried home remedies to selfabort. Mother said she did not want the child and was going to give it up for adoption. Petitioner told mother she would take care of the baby and asked mother to give the baby to her. Mother agreed she would give the child to petitioner. Petitioner helped

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³ All future code references are to the Family Code.

mother rent a trailer in March of 2006, and mother moved out of petitioner's home before the baby was born.

Mother went to the hospital to give birth. Mother signed herself into the hospital. Petitioner was present when the baby was born. Mother asked petitioner what she was going to name "your child" and petitioner named the child J.C.

Petitioner helped bring J.C. and mother back to petitioner's home following their release from the hospital. Petitioner asked mother if she wanted J.C. and mother responded she did not want him--"he's yours."

Two days after J.C. was born, petitioner took mother to a notary. The notary prepared a document in the form of an affidavit that stated that mother was the biological mother of J.C. and that she granted permanent legal and physical custody of J.C. to petitioner and her husband. In addition, she authorized them to sign any documents required for making decisions and obtaining medical treatment for J.C. The affidavit was notarized and signed by mother, petitioner, and petitioner's husband.

Petitioner attempted to take J.C. for a visit to the doctor, but the doctor would not accept the affidavit. Petitioner then obtained a power of attorney form. Petitioner filled out the form and took mother to another notary, who notarized the power of attorney three days after the affidavit was notarized. The power of attorney stated that mother was the natural mother of J.C. and that her son was being cared for by petitioner. She gave full power of attorney to petitioner with respect to the care and custody of J.C.

Mother moved out of petitioner's home. Petitioner would occasionally take mother to the store, but petitioner did not have J.C. with her when she did this. Mother never asked about J.C., never called about J.C., and never provided any support for J.C. Mother saw J.C. one time at Christmas when J.C. was one and a half years old. She brought him a toy and visited for five to 10 minutes.

Petitioner's adult daughter testified that mother lived with them during part of her pregnancy. Mother did not eat right or take her vitamins. Mother said she wanted

to have an abortion and that she hated the baby because he reminded her of the baby's father. Petitioner's daughter said mother never called, never sent cards, did not provide money and made no contact with J.C.

Petitioner's mother took care of J.C. in her daycare business. Petitioner's mother testified that mother wanted to abort J.C. because she didn't want J.C. to remind her of his father. Mother knew where petitioner's mother lived, yet she never visited or called after J.C. was born.

Maria V. knows petitioner and mother. She testified that mother wanted to abort her first child, and also wanted to abort J.C. Mother told Maria V. she did not want J.C. and was going to give him away to petitioner. Mother offered the baby to Maria V. before he was born.

Several witnesses testified that they asked mother about her baby after J.C. was born. Mother gave various responses, including that the baby died, that she did not want to know anything about J.C. and that J.C. was no longer hers. When petitioner's cousin told mother that J.C. looked like her, mother responded that she did not have a son and to never tell her that again.

Martha Martinez Coronado testified at the hearing that she was the person who notarized the affidavit that was signed two days after J.C.'s birth. She had been a friend of petitioner's family for 20 years but was not friends with petitioner. Petitioner, petitioner's husband, and mother came to Coronado's office. Coronado typed the affidavit. Coronado asked mother in Spanish if the affidavit reflected what she wanted. Mother wanted to give J.C. to petitioner permanently. Mother was not reluctant to sign the affidavit.

Noemi Flores testified that she notarized the power of attorney. She was not acquainted with petitioner or mother. Mother came into the office by herself with the document. Flores translated the document to mother. Mother understood that she was giving custody of J.C. to petitioner. Mother was not upset after she signed the

document. Two days prior to this, mother came to Flores's office asking her to prepare a document to give J.C. away permanently. Flores refused to prepare the document and told mother she had to go through the court system.

Mother testified at the hearing and called several witnesses to support her position. Mother's testimony was diametrically opposed to the testimony of petitioner on many points. Mother testified that petitioner wanted mother to give her the baby. Mother never said she did not want the child and never told anyone she wanted an abortion.

Mother let petitioner name J.C. and make decisions regarding J.C. because mother feared petitioner. Mother left the hospital with petitioner and went to her home. She stayed in petitioner's home for two weeks. Petitioner took care of J.C. during this time and told mother she could not care for him. Petitioner told mother she would help her and also told mother she needed to sign a piece of paper. Mother signed the documents petitioner told her to sign but did not know what the documents stated. She signed the documents under pressure from petitioner. Mother never intended to leave J.C. with petitioner permanently. Mother left petitioner's home after two weeks because petitioner was mistreating mother's daughter J.

Mother testified she saw J.C. on a daily basis. She would go to petitioner's house and petitioner would come to her house. The visiting stopped after Christmas 2007. Petitioner did not want mother to be close to J.C. and told mother to not take pictures during their visits. Petitioner told mother she was going to take mother's daughter away from her and mother feared petitioner. Petitioner threatened mother and often told her that without her (petitioner) mother was nothing.

After petitioner curtailed mother's visits with J.C., mother sought help to regain custody of J.C. Delores Cercado, the Healthy Start case manager, testified that mother came into her office in April of 2008 and wanted assistance in getting her baby back.

Mother was sent to a psychologist and to parenting classes. Cercado stated that mother was a loving, involved parent.

Diana Chavez, a psychologist, began seeing mother in June of 2008. She said that mother was depressed. Her depression began before the birth of J.C. and her symptoms worsened due to pressure by petitioner. Petitioner was psychologically abusive toward mother. Chavez did not have personal knowledge of any of the events prior to the initiation of treatment in June of 2008.

Mother's current boyfriend, Francisco Loza, testified that mother and her daughter live with him. Mother initially told him she lost her baby, but later told him the truth.

Mother called petitioner and petitioner's mother as witnesses on her behalf.

Petitioner's mother testified that she took care of mother's daughter for two or three weeks after J.C. was born. Petitioner's mother was also taking care of J.C. at the time. When mother would come to pick up her daughter, she stayed outside and had no contact with J.C.

Petitioner signed a declaration under penalty of perjury for a restraining order against her husband, who was now living in Mexico. Petitioner admitted that her declaration contained falsities, but the girl who helped her with the declaration suggested the contents of the declaration so that petitioner could obtain the restraining order. Petitioner testified she sought the restraining order because she was afraid her husband would take J.C. away from her.

J.C.'s counsel filed a report with the court regarding the guardianship petition. This report was considered by the court in this termination proceeding. He interviewed petitioner, mother, and others. He concluded that the transfer of custody of J.C. by mother to petitioner was voluntary. He further concluded that for two years mother failed to contact or support J.C. except for the one short visit at Christmas.

Minor's counsel stated his position at the termination hearing. Based on discrepancies he found in mother's story, his interviews with independent witnesses, and referrals to child protective services regarding mother's daughter, counsel concluded that there was clear and convincing evidence that the best interest of J.C. would be served by granting the petition.

The social worker filed a report for the hearing. She stated that "[d]ue to conflicting statements of the parties involved it is unclear what the plan for this minor was suppose[d] to be." The social worker concluded that because J.C. has begun to establish a comfortable relationship with mother during court-ordered visitation, a severance of the parental rights of mother would be detrimental to this child. Her final recommendation to the court was "that disposition of the pending petition be at the discretion of the Court."

The court set forth detailed reasoning for its granting of the petition. The court stated there was no doubt in its mind that clear and convincing evidence has shown that J.C. was left in the care, custody and control of petitioner for a period far in excess of six months. He found that the Christmas visit was a short visit, was the only contact of any significance, and the significance of the visit was limited. The court found evidence of intent to abandon J.C. by mother in the form of the notarized statements. The court rejected mother's claim that she wanted to keep J.C., including that she had been bullied, intimidated, and depressed. He found it was true by clear and convincing evidence that once mother was jilted by father she did not want J.C. and had the intent to abort him until she was convinced by petitioner to let petitioner raise the child. The court believed that mother sincerely did not want the child and abandoned him. The fact that mother changed her mind did not change the conclusion by the court that she gave him up. The court granted the petition.

DISCUSSION

A proceeding to declare a child free from the custody and control of a parent may be brought when the child has been "left by both parents or the sole parent in the care and custody of another person for a period of six months without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child." (§ 7822, subd. (a)(2).)

"Thus, a section 7822 proceeding is appropriate where 'three main elements' are met: '(1)the child must have been left with another; (2) without provision for support or without communication from ... his parent[] for a period of [six months]; and (3) all of such acts are subject to the qualification that they must have been done "with the intent on the part of such parent...to abandon [the child]." [Citation.] 'The ... failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon. If the parent ... ha[s] made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent....' (§ 7822, subd. (b).)

"An appellate court applies a substantial evidence standard of review to a trial court's findings under section 7822. [Citation.] Although a trial court must make such findings based on clear and convincing evidence [citation], this standard of proof "is for the guidance of the trial court only"; on review, our function is limited to a determination whether substantial evidence exists to support the conclusions reached by the trial court in utilizing the appropriate standard." [Citation.] Under the substantial evidence standard of review, "[a]ll conflicts in the evidence must be resolved in favor of the respondents and all legitimate and reasonable inferences must be indulged in to uphold the judgment." [Citation.] Abandonment and intent "are questions of fact for the trial judge.... His decision, when supported by substantial evidence, is binding upon the reviewing court. An appellate court is not empowered to disturb a decree adjudging that a minor is an abandoned child if the evidence is legally sufficient to support the

finding of fact as to the abandonment [citations]." [Citation.] 'The appellant has the burden of showing the finding or order is not supported by substantial evidence.' [Citation.]" (*Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010-1011, fns. omitted.)

On appeal, mother contests the court's findings on all three elements of the section 7822 determination of abandonment. First, she claims insufficient evidence supports the court's finding she left J.C. in petitioner's care and custody for the applicable time period. She contends the leaving of the child must be a voluntary action and in this case that did not occur because the leaving occurred under coercive circumstances.

We need not detail the lengthy arguments of mother regarding the voluntariness of her abandonment because her argument flies in the face of the substantial evidence test as set forth above. Mother's version of events and circumstances is diametrically opposed to the version of events and circumstances as set forth by petitioner. The court believed petitioner's case and rejected mother's evidence. We cannot reweigh the evidence. There was substantial evidence that mother left J.C. voluntarily in the care of petitioner.

Next, mother argues that the failure to support J.C. is not supported by substantial evidence. Petitioner admitted during her testimony that she signed a document in the child support office of the county on May 21, 2007, where petitioner stated she did not want child support from mother. Mother admits she did not support J.C. We need not determine if mother's failure to support for the entire period is alleviated by petitioner's agreement in May of 2007 that mother need not pay support, because the statute for abandonment is disjunctive, allowing a showing on either the failure to support **or** the failure to maintain contact.

Mother argues there was insufficient evidence of a failure to communicate for the requisite period of time. Mother points to the Christmas visit, and then the

communication and visitation that occurred beginning with mother's visit to petitioner's home in April of 2008 to reclaim custody of J.C. Mother points to the conflicting evidence regarding visits that occurred prior to April of 2008 and claims that if mother is the truthful party there was not any six-month period where she did not communicate with the intent to abandon J.C.

Again mother's argument flies in the face of the substantial evidence rule. The trial court found that mother was not believable and petitioner was. According to petitioner's version, mother did not call, visit, send letters, or otherwise communicate with J.C. from the time she left petitioner's home until she showed up with the police to reclaim him, with the exception of the one Christmas visit. After mother showed up at petitioner's doorstep in April of 2008, petitioner began legal proceedings to gain legal custody of J.C. This is substantial evidence that mother did not communicate with J.C. for the requisite period of time.

As her final argument, mother asserts the evidence is insufficient to show that she intended to abandon J.C. She claims that her statements and her actions were sufficient to rebut any presumption of abandonment.

"A parent's 'failure to provide support[] or failure to communicate' with the child for a period of [six months] or more 'is presumptive evidence of the intent to abandon,' and '[i]f the parent [has] made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent...' (§ 7822, subd. (b).) The parent need not intend to abandon the child permanently; rather, it is sufficient that the parent had the intent to abandon the child during the statutory period." (*In re Amy A.* (2005) 132 Cal.App.4th 63, 68.)

Once again, the trial court did not believe the testimony of mother. Her attempt to reclaim J.C. was too late, as the statutory period for abandonment had already occurred. Mother's token effort to visit J.C. once on Christmas did not defeat the

finding of abandonment. Substantial evidence supported the trial court's finding that mother had an intent to abandon J.C.

While it would be tragic to terminate mother's parental rights if in fact her version of events were true, the trial court determined that petitioner's evidence was the believable evidence. We do not have any legitimate reason to overturn this finding of credibility and we are bound by those findings.

DISPOSITION

The judgment is affirmed.

	VARTABEDIAN, J
WE CONCUR:	
ARDAIZ, P. J.	
LEVY, J.	